1993

No. 93-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR J. D. PAGE

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QUESTIONS PRESENTED

This is a summary judgment case. The Federal Deposit Insurance Corporation ("FDIC") brought an action against respondents for negligence in connection with two failed savings associations. The FDIC contended that if the respondents had warned the savings associations about five different transactions, the transactions would not have taken place, and that the savings associations would not have suffered putative losses. The respondents moved for summary judgment based on the grounds that the causes of action were barred by limitations and that the respondents' alleged actions were not the proximate cause of any damage. The questions presented to the Court -- any one of which answered in the affirmative should dictate the denial of the petition for a writ of certiorari -- are as follows:

1. Whether the FDIC met its burden of proof in responding to the respondents' motions for summary judgment.

2. Whether a state law claim for negligence that was time-barred by the applicable state statute of limitations prior to its assignment to the FDIC is revived by Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. § 1821 *et seq.* ("FIRREA").

3. Even if the FDIC had acquired a negligence action as to which limitations had not yet run, whether the FDIC sued the respondent Page within the three year limitations period allowed by FIRREA.

LIST OF PARTIES

Respondents are Shrader & York, a Texas partnership in dissolution; Shrader, York, Clote, Hinds & Grote, P.C., successor organization to Shrader & York; Shrader, Clote, Hinds & Grote, P.C.; William E. York; William C. Shrader; Paul D. Clote; Gary E. Clote; Eldon L. Hinds; Lee H. Henkel, III; and -- to the extent that he has been properly brought before the Court -- J. D. Page.

ABBREVIATIONS USED IN THIS BRIEF

The following abbreviations are used throughout the brief:

FDIC	Federal Deposit Insurance Corporation
Pet.	The FDIC's petition for writ of certiorari
Pet. App.	Appendix attached to the FDIC's petition
Resp. App.	Appendix attached to this brief
FIRREA	Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821 *et seq.*

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BRIEF IN OPPOSITION FOR J. D. PAGE

STATEMENT OF THE CASE

1. *Background.* In May 1991, the FDIC sued the respondents (other than Page) for their alleged negligence in connection with five different transactions involving Lamar Savings Association ("Lamar") and City Savings Association ("City"). The FDIC had taken over the failed institutions in

May 1988. *Pet.* at 2. According to the FDIC, the transactions in issue took place as follows: (1) Realty Development Corporation ("RDC"): January 1983; (2) Brazos Savings Association: July 1983; (3) 8214 Westchester: December 1984; (4) CTC (USA) Corporation: May 1985; and (5) Stone Oak: 1985. *Pet. App. A* at 2a. The FDIC alleged that Shrader & York failed to advise the corporations to obtain regulatory approval for the transactions, *Pet. App. B* at 26a, that the transactions resulted in losses, and that if the corporations' boards has been so advised of the illegal nature of the five transactions, the boards would have blocked the transactions. *Pet. App. A* at 4a.

2. The FDIC brought this action in its corporate capacity as "manager of the FSLIC Resolution Fund." Pet. 5 n.2. The FDIC sued to recover for putative injuries to Lamar and City; the FDIC did not contend that it was injured, and did not seek to prove an injury to any individual or entity other than the defunct corporations.

3. The FDIC alleged in the courts below, with no apparent embarrassment at the inconsistency, both (1) that at the time the respondents allegedly failed to warn the corporations' boards about the transactions, and (2) that the corporations were dominated and controlled by Stanley Adams and that Adams contrived and fully comprehended the transactions. *Pet. App. A* at 11a, 12a.

4. In *Lamar v. Adams, et al.*, in the United States District Court for the Western District of Texas, the FDIC had sued Stanley Adams and others for damages for fraud arising out of their control of Lamar and City. The FDIC's civil complaint against Adams establishes not only that Adams was not misled in any way by the respondents, but to the contrary that he knew full well the financial condition of Lamar and City. The FDIC contended that Adams eventually worsened the condition by fraudulently operating Lamar and engaging in risky and improper lending practices. *Pet. App. A* at 11a.

5. Further, the pleadings in *Lamar v. Adams* clearly stated that as early as April 1983, the corporations' outside auditors were aware of and had given sufficient notice to the Lamar and City boards of directors of significant problems with at least one of the transactions in question in the case at bar -- the June 1983 Brazos-Lamar merger -- to warrant further investigation by the directors. *Resp. App.* at 1.

6. In the case at bar, the FDIC alleged -- without offering proof -- that Shrader & York was responsible for ensuring regulatory compliance by Lamar and City with the transactions. *Pet. App. B* at 26a. However, in *Lamar v. Adams* the FDIC's predecessor sued the Austin, Texas law firm of Shanks & Butler for, among other things, failing to ensure regulatory compliance by Lamar and City with the

some of the same transactions, including the RDC transaction and the Lamar-Brazos merger. Shanks & Butler's role, unmentioned by the FDIC in the case at bar, was enough that the complaint against Shanks & Butler alleged that "they were the attorneys who handled the commercial loan and investment transactions .... In particular, they failed to review, and to take reasonable steps to ensure compliance with, laws and regulations applicable to said transactions and failed to take reasonable steps to protect Lamar's interests in said transactions." *Resp. App.* at 2.

7. The FDIC alleged only that the respondents were negligent. The FDIC has not suggested that the respondents were part of a conspiracy with Adams and others, that they were aiders and abettors of Adams, or that they acted intentionally to harm Lamar or City. *Pet. App. A* at 2a, 25a.

8. *Additional background as to the respondent Page.* On September 4, 1991, four months after the FDIC filed suit against the other respondents, and the day before the district court granted summary judgment as to the other respondents, the FDIC moved for leave to name Page as a defendant and served Page with summons to appear and defend.[1] The district court did not grant the FDIC's motion

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[1] The respondent Page was a trial lawyer who had nothing to do with the transactions, and who left Shrader & York in March 1983, more than eight and a half years before he was sued. The FDIC's complaint against Page was that he was a partner in Shrader & York at the time of the January 1983 RDC transaction. The FDIC did not allege or seek to

for leave to join Page as a defendant, but nonetheless ordered that summary judgment be granted in favor of Page against the FDIC.

9. The FDIC has offered as Appendix B to its petition the district court's September 5, 1991 summary judgment against the FDIC's claims against the respondents other than Page. The FDIC has not cited this Court to the district court's summary judgment of the FDIC's claims against Page, and accordingly has apparently not sought review of that separate judgment.

10. The FDIC has petitioned for review of the Fifth Circuit's judgment, and offers as Pet. App. A the Fifth Circuit's opinion affirming the district court's summary judgment. The Fifth Circuit's opinion does not refer to Page. The opinion does specifically refer to the FDIC's action brought in May 1991, but there is no mention of any subsequent action in September 1991, pursuant to which the FDIC purported to join or attempt to join Page as a defendant. Pet. App. A at 2a. The Fifth Circuit's opinion likewise refers to

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prove that Page participated in or gave any advice regarding any of the transactions in question. Further, although the FDIC appears to have sued Page for the losses claimed from all five transactions in issue, by virtue of the FDIC's limited contention that Page was a partner at Shrader & York only during the RDC transaction in January 1983, and the FDIC's concession that Page left the Shrader & York partnership in March 1983, it appears the FDIC concedes there is absolutely no basis for Page to be liable for four of the five transactions which took place after he left Shrader & York.

the district court's September 5, 1991 opinion at 777 F. Supp 533. Pet. App. A at 2a. The district court's September 5, 1991 opinion does not refer to Page. Pet. App. B.

11. Since the FDIC has identified Page as a respondent, Page responds now out of an abundance of caution and with the renewed request that he be completely dismissed from these proceedings.

12. Further, even if this Court completely accepted the FDIC's erroneous arguments that a negligence action against respondents was not yet barred by limitations when the FDIC acquired it on May 18, 1988, the FDIC yet failed to sue Page even within the three year grace period allowed by FIRREA. The FDIC did not even seek leave to sue Page until September 4, 1991, more than three years after it acquired the putative negligence claim against Page. Accordingly, if Page had been properly brought before the district court, the Fifth Circuit Court of Appeals or this Court, the FDIC's claims against Page were barred by limitations. There is nothing in the record to indicate that the FDIC has informed any court of any reason to toll limitations against Page beyond May 18, 1991, and accordingly Page's motion for summary judgment was properly granted.

13. *The district court's decision.* The court's September 5, 1991, summary judgment opinion cited the FDIC's own pleadings to support the finding that Adams

knew of the facts which the respondents allegedly failed to disclose, that Adams' knowledge was properly imputable to the corporations, and that the causes of action thus had accrued no later than 1985. *Pet. App. B.* at 28a. The court held the malpractice claims were barred by the Texas two-year statute of limitations before the FSLIC and then the FDIC acquired the claims. *Id.* at 27a. The district court declined the FDIC's invitation to re-write FIRREA to create a rule whereby the FDIC's acquisition of a failed institution would revive stale claims. *Id.* at 28a-29a. The district court likewise held that the FDIC had failed to present any summary judgment evidence that the financial loss complained of was caused by the alleged negligence of the respondents. *Id.* at 29a.

14. *The Fifth Circuit's decision.* The Fifth Circuit affirmed the September 5, 1991 order of summary judgment. The Fifth Circuit agreed with the district court's observations that FIRREA "does not revive stale state law claims acquired by the FSLIC or FDIC," and that if the FDIC's claims expired before May of 1988 the respondents' statute of limitations defense was meritorious. *Pet. App. A* at 7a. The FDIC had agreed that the Texas limitation period for legal malpractice claims was two years, and that the transactions giving rise to the claims against respondents all occurred before May of 1986. The Fifth Circuit noted that the FDIC's claims had expired before they were acquired by the FSLIC in May of

1988 unless the FDIC prevailed on one of the equitable doctrines it urged to extend the limitation period. *Id.*

15. The FDIC argued (1) that Texas's discovery rule kept the statute of limitations from running before May of 1988, and alternatively (2) that the doctrine of adverse domination tolled the running of limitations. *Id.* at 7a, 8a. The Fifth Circuit ruled that under the federal summary judgment rule -- contrary to the Texas state procedural rule under which the FDIC's local counsel apparently operated in responding to the motions for summary judgment -- "the FDIC bore the burden of producing some summary judgment evidence in support of its discovery rule argument." *Id.* at 8a, 9a.

16. Under the Texas discovery rule, as the FDIC itself argued, the statute of limitations for legal malpractice begins to run when the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action. *Id.* at 10a. After carefully reviewing the record, including the FDIC's own statements in related cases against Adams, the Fifth Circuit ruled that the FDIC had simply not met its burden of proof in responding to the motions for summary judgment. "At trial, to successfully establish that Adams' knowledge of the fraudulent activity was not imputed to the corporation under the discovery rule, the FDIC would have to prove that Adams acted adversely or committed fraud

against City and/or Lamar. Therefore, to avoid summary judgment, it bore the burden of producing some summary judgment evidence of this argument.... An examination of the individual transactions reveals the inadequacy of the FDIC's summary judgment evidence on this issue." *Id.* at 18a, 19a, 20a. Because the FDIC did not meet its summary judgment burden -- and likely because the FDIC's own statements contradicted its argument -- the Fifth Circuit concluded that the statute of limitations was not extended or tolled. *Id.* at 10a.

17. The Fifth Circuit likewise rejected the FDIC's adverse domination argument. The summary judgment record -- the greater part of which was the FDIC's own statements -- showed that Adams was familiar with the transactions and knew the facts about which the FDIC claimed the respondents should have warned the corporations. *Id.* at 10a, 11a. "Adams should have discovered, through the exercise of reasonable care and diligence, the losses caused by the schemes and the other facts establishing City and Lamar's legal malpractice claims against Shrader & York." *Id.* at 12a. The Fifth Circuit held that the FDIC had not offered summary judgment evidence that Adams had acted adversely to the corporations, *Id.* at 19a-23a, and ruled that Adams's knowledge should be imputed to the corporations in accordance with the generally accepted rule that a bank officer or director's knowledge is imputed to the bank. *Id.* at 12a. The Fifth Circuit's opinion is careful and limited: "Moreover, the FDIC does not allege that Shrader and York committed intentional

torts, or conspired with Adams to defraud City or Lamar. Thus we agree with the district court that, in this particular case, Texas's discovery rule adequately addresses the FDIC's policy concern." *Id.* at 25a.

REASONS FOR DENYING THE PETITION

18. *This case has been and may again be properly disposed of on simple procedural grounds.* Put simply, the FDIC lost its case because it did not offer proof to meet its summary judgment burden. The proof before the district court clearly contradicted the FDIC's assertions. In its original brief before the Fifth Circuit, the FDIC suggested the district court was wrong to grant summary judgment because it somehow unfairly denied the FDIC sufficient discovery to respond to the appellees' motions for summary judgment. When the FDIC quoted from *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 n.15 (1987) ("Summary judgment is available only 'after adequate time for discovery' has elapsed") (*Resp. App.* at 3), the FDIC sought to convey the impression it failed in its burden in responding to the motions for summary judgment only because the district court refused to allow it enough time to muster its proof. The FDIC's implied assertion was unfair to the district court and suggested something that was simply untrue. The FDIC's abandonment of that argument was the best proof that the argument lacked merit. The FDIC had never asked the district court for additional time to respond or to take

discovery. The very fact that the FDIC troubled to make the argument on appeal clearly indicates that the FDIC knew it had failed in its procedural burden and sought to escape the consequence of its failure to meet that procedural burden.

19. If the FDIC had truly needed some specific discovery to respond to respondents' motions for summary judgment, it was obligated to comply with Rule 56(f) by informing the district court what specific discovery was needed. *Securities & Exchg. Comm'n v. Spence & Green Chemical Company*, 612 F.2d 896 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981). Diligence in opposing a motion for summary judgment is required. *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 832 (5th Cir. 1967), *cert. denied*, 389 U.S. 832 (1967). The FDIC was not diligent in responding to the motions for summary judgment, and it did not meet its summary judgment burden. Accordingly, the petition for writ of certiorari should be dismissed.

20. *The FDIC failed to raise an issue of fact as to whether the respondents' alleged acts proximately caused the financial loss complained of by the FDIC.* The district court also rejected the FDIC's negligence claim because the FDIC failed to raise an issue of fact as to whether the respondents proximately caused an injury to Lamar and City. The district court ruled that the case was controlled by the proximate cause standard articulated in *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part and*

rev'd in part, 459 U.S. 375 (1983). To recover against the respondents for negligence, Lamar or City would have to prove that they justifiably relied on the alleged defects of the respondents' advice in taking the actions that allegedly led to their losses. Lamar and City would have to establish that Adams, who the FDIC contends controlled the corporations, was misled by the respondents' advice, and would not have acted as he did but for that advice. Without such proof the FDIC could not establish the essential element of but-for causation or cause-in-fact. To prevail in negligence against the respondents, the FDIC was required to prove that but for Lamar's and City's reliance on the alleged negligence of the respondents, they would not have taken the actions which the FDIC claims led to the losses. The FDIC could not and did not establish this "but-for" causation.

21. *This case may be disposed of as to Page because he has not been properly brought before the Court.* It appears Page has never been properly joined as a party, and should not be before this Court. It likewise does not appear from the record that the FDIC properly appealed to the Fifth Circuit with respect to Page or is even now seeking relief from the district court's order, subsequent to September 5, 1991, granting summary judgment against Page. Accordingly, Page should be dismissed.

22. *This case may be disposed of as to Page because he was not sued within the three year limitations*

period allowed for actions which are not barred by limitations when acquired by the FDIC. Further, even if this Court completely accepted the FDIC's erroneous arguments that a negligence action against respondents was yet alive when the FDIC acquired it on May 18, 1988, the FDIC yet failed to sue Page or move for leave to add him as a party within the three year grace period allowed by FIRREA. Accordingly, even if Page had properly been brought before the district court, the Fifth Circuit Court of Appeals or this Court, the FDIC's claims against Page were yet barred by limitations. Since the FDIC did not even plead the tolling agreements, summary judgment was compelled. Since the FDIC did not bring the district court's order granting Page's summary judgment forward before the Fifth Circuit, the Fifth Circuit was entirely correct in not mentioning that order in its affirming opinion. Again, Page should be dismissed from this proceeding.

23. *The Fifth Circuit correctly decided this case based on the record before it and the pertinent Texas law which both the FDIC and the respondents agreed controlled.* The Fifth Circuit's decision does not conflict with *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992), or with any decision of this Court or of any other circuit, and the case does not otherwise warrant plenary review. Page respectfully adopts by reference the full arguments made by the other respondents, and adds the following by way of summary:

a. The FDIC now apparently concedes an argument, once ardently made by the FDIC, that FIRREA does not operate to revive stale claims.

b. The FDIC's claims of negligence became time-barred by the Texas two-year statute of limitations while those claims were still held by the assignor corporations. In the courts below, this is an issue which the FDIC argued was to be decided by applicable state law principles. It is at best inappropriate for the FDIC to challenge the decisions of the courts below based on a new argument that some amorphous and previously undescribed federal law should control.

c. The FDIC acquired by assignment only the rights its assignor had at the time of the assignment, and whether the statute ran against the assignor prior to assignment is purely a question of state law. The Fifth Circuit's opinion in the case at bar is consistent with the Ninth Circuit's decision in *FDIC v. Former Officers & Directors of Metro. Bank*, 884 F.2d 1304 (9th Cir. 1989):

> It is settled law that state limitations statutes are relevant in determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired before

> the government acquires a claim, the claim is not revived by transfer to a federal agency. *See Guaranty Trust Co. v. United States,* 304 U.S. 126, 142 (1938).

884 F.2d at 1309 n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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